

Cancer: legal rights and responsibilities

For people with cancer, their
family and friends



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Introduction

This booklet aims to inform you about your legal rights and responsibilities as a result of being diagnosed with cancer. It has been written for people living with cancer and their families and friends.

The information in this booklet is general. To get the best advice for your needs, speak to a lawyer who specialises in the area you are interested in.

- * For non-legal information about cancer, telephone the Cancer Council Helpline on 13 11 20, Monday to Friday, 8.30 am to 8 pm.
- * Are you reading this for someone who does not understand English? Tell them about the Multilingual Cancer Information Line. See the inside back cover for details.

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Superannuation and insurance for people living with cancer

This section tells you about superannuation and insurance policies; superannuation contributions; how you can make claims, particularly for disability benefits; the effect on your Social Security payments; and what happens if you return to work.

It also discusses your rights of appeal and the Superannuation and Insurance Advice Service.

Superannuation benefits

Superannuation has been compulsory since 1992. Many people living with cancer may be able to claim a lump sum or pension if they have a superannuation policy.

Superannuation funds often will pay a lump sum if you cannot keep working because of your illness. This benefit is often provided as 'extra' on top of your superannuation contribution. Some funds also pay a disability pension two years or more.

Many people do not know what or when they can claim from their superannuation fund. Superannuation funds send out statements every year, but they can be hard to understand.

If you are not sure whether you are entitled to any disability benefits, or if you cannot find any of your statements, ask your employer, your superannuation fund or someone who has expertise in this area.

When must superannuation contributions be made?

Under the superannuation laws, your employer must pay your superannuation contributions into a fund at least once every three months. Many employers have agreements with superannuation funds

to pay more often, for example, monthly or fortnightly. Some industrial awards also state that employers must pay superannuation more often. To find out, read your employment agreement or contact:

- the Superannuation and Insurance Advice Service (see page 10)
- your employer
- your union in relation to your award.

What if superannuation contributions aren't paid?

If your employer does not pay superannuation into a fund for you, get help immediately from the Australian Taxation Office, a lawyer who specialises in this area, the Superannuation and Insurance Advice Service or your union.

Obtaining your superannuation contributions payouts

Contributions you have made voluntarily to your superannuation fund can be paid to you when you leave the fund.

The general rule is that contributions made by your employers to your fund must stay in the fund until you are 55 or 60 years old.

However, there are exceptions to this rule. You can access your employers' contributions to your fund if any of the following applies:

- 1 You have been on social security payments for at least six months (or nine months, if you are over 55 years and nine months of age) and can't pay your living expenses.
- 2 Your house is about to be sold by a bank or other mortgagee.
- 3 You need money for palliative care, death expenses, changes to your house or car, or medical expenses outside the public health system for you or a dependant.
- 4 You are totally and permanently incapacitated.
- 5 You have a superannuation account balance of less than \$200.
- 6 You are a temporary resident, and leave Australia for good.

Superannuation disability claims

Claiming disability benefits

Many people living with cancer can claim disability benefits.

To get a disability lump sum, you usually have to show you can't ever go back to your previous job or any other suitable work that fits your education, training or experience.

For example, if you have worked all your life as a labourer or process worker, you will have to show that you cannot do manual work again.

It doesn't matter how a disability or illness came about. All disabilities and illnesses are acceptable for a superannuation disability claim.

Many people on social security benefits will be able to claim.

Making a disability claim

You can usually make a claim any time.

It doesn't matter if you have already had your superannuation contributions paid out to you, even if that happened a long time ago. Disability claims can also be made by the estate of a person after they die. There will be claim forms to fill in and medical reports and other papers to send in. It is important to give the right information and reports to help a disability claim. It may take many months before a decision is made. You may be asked to go to some medical examinations.

If a claim is rejected, you can appeal to a court or the Superannuation Complaints Tribunal.

It is often worth appealing, as many appeals settle before they reach court or are successful when they are heard in court.

*** It is important to get help from a lawyer experienced in insurance claims or appeals. To find a lawyer who specialises in this area, telephone the Law Institute of Victoria Referral Service on 9607 9550.**

Superannuation death claims

Superannuation funds pay death benefits to the dependants or the estate of a deceased person. In most cases, the superannuation fund trustee is not bound to give benefits to your nominated beneficiaries. A decision of the superannuation trustee can be appealed. Contact the Superannuation and Insurance Advice Service for assistance.

Personal insurance benefits

Some people living with cancer may be able to claim disability benefits from other insurance or superannuation policies that they hold.

Types of insurance policies

Some people have their own superannuation or life insurance policies that may include disability lump sums or ‘premium waiver benefits’.

Premium waiver benefits are when the insurance company pays your premiums for you when you can’t because you are ill and/or not working. Most self-employed people have income protection insurance to cover their loss of income if they can’t work.

Banks and finance companies sometimes ask their customers to take out insurance to cover mortgage or loan repayments if they can’t keep up the payments because of disability. You will need to check with your bank or your personal records to find out if you are covered.

Some credit cards include disability lump sums as a benefit. You will need to check with your credit card provider to find out if your credit card has such a policy. Some banks, employers, unions, credit unions and sporting and social clubs have disability insurance policies for their members. You should check your records with each organisation or with the Superannuation and Insurance Advice Service.

Making claims and appeals

Insurance disability claims can usually be made at any time although it is better to make a claim as soon as possible.

There will be insurance claim forms to fill in and medical reports and other papers to send to the insurance company. It is important to provide the right information and reports to help your claim. It may take many months before a decision is made, and you may be asked to have some medical examinations.

If the insurance company rejects your claim, you can appeal their decision to a court or to a low-cost insurance complaint scheme. You can get help from the Superannuation and Insurance Advice Service.

Obtaining new insurance or superannuation policies

If you already have cancer, it may be difficult to take out a new policy which includes disability or death benefits.

If you try to take out your own insurance or superannuation policy, you will usually have to fill in a medical questionnaire for the insurer to calculate your health risks and decide whether they wish to cover you.

If you know you have cancer, in most cases you will have to tell the insurer. They may then refuse to cover you for disability payments. If you know that you have cancer when you join but do not tell the insurer, then they may refuse to fulfil their obligations and will not pay disability payments to you. However, this is not always the case. If you have had cover for more than three years, an insurance company may only refuse to pay you or reduce your payments if:

- you did not tell the insurer about your condition when you started your insurance cover; and
- your failure to disclose that information was meant to deceive and dishonest.

It may be possible to get insurance that includes disability and death cover by joining a 'group' superannuation or insurance scheme, for example, with your employer or your union or credit union. In such

schemes, you may be offered automatic cover without any health tests or questions.

Superannuation/insurance and your social security payments

In determining the amount of social security you are entitled to be paid, the value of your assets and any income you receive will be taken into account. This will include the following payments.

Superannuation lump sums

Any superannuation lump sum you are paid will usually be taken into account in an assets test to work out the amount of your social security payments. However, if you keep the money in a superannuation fund, it will not count as an asset until retirement age.

Superannuation pensions

Superannuation pensions are treated as income, and may reduce your social security payments.

Insurance lump sums

An insurance lump sum payout will be taken into account in the assets test to work out the amount of your social security payments.

Insurance income/pension payments

Payments from income protection insurance are usually treated as income, and may reduce your social security payments.

Superannuation/insurance and returning to work

If you have stopped work because of cancer, you can return to work if your health improves and you feel that you are able to go back to work. If you do go back to work and you have already been paid a

superannuation or insurance disability lump sum, you will not have to repay the lump sum. If you are receiving a superannuation or insurance pension, you have to tell the fund or insurer that you are returning to work. If you do not tell them, you may be liable to repay any payments you received. If you return to work, and you are earning more than \$450 per month, your employer will once again have to pay your superannuation contributions. Your new superannuation fund may also include death and disability benefits even though you have cancer.

Superannuation and Insurance Advice Service

Need to get advice?

Many people do not know that they can claim disability benefits from their superannuation or insurance. If your working life is cut short, you probably won't have enough superannuation. Extra disability benefits will help you. This is because your superannuation is designed to last for an 'average' period of retirement, not longer.

Where can I get help?

The Superannuation and Insurance Advice Service is a free service. It has been set up to provide legal advice to people with disabilities. The advice is given by volunteer lawyers. The service is based in Melbourne.

- ★ **You can get free advice by telephone or by appointment. Telephone the Chronic Illness Alliance on 9882 4654.**

- * You may wish to ask lawyers with expertise in superannuation and insurance for advice or see a financial counsellor. To find a lawyer who specialises in this area, telephone the Law Institute of Victoria Referral Service on 9607 9550.
- * The information in this chapter is brief, and may not be relevant to every claim. Superannuation is a complex area of law. It is important that you get specialist advice.

Wills

Why make a Will?

A Will is a legal document that specifies how you want your assets to be distributed when you die. Making a Will is very important. It is the only way that you can make sure that your assets are protected and that your estate is distributed as you wish. If you die without a Will, you will not be able to say who oversees the distribution of your estate or who is to receive a share in it. It will be divided and distributed by a legal formula, and may not be as you expect or want it to be. If you die without a Will, your estate will go to your nearest next of kin.

In short, if you have a spouse and no children, your estate will go to your spouse. If you have a spouse and children, your chattels (personal belongings) and your estate to the value of \$100,000 will go to your spouse. The rest will be divided among your children. If you have no spouse or children, then your estate will go to your parents. If they are no longer living, then it will go to your brothers and sisters. If they are no longer living, it will go to your nieces and nephews.

It can be complicated for people with little family. Sometimes an organisation like the State Trustees must search to find someone's next of kin. This is time-consuming and expensive.

Anyone who thinks that they should have been included in the Will could challenge it.

Before you make a Will

Make a list of everything you own. Include all real estate, furniture, bank accounts, shares, money on term deposit, business holdings, insurance policies, collectables, interest in a trust or deceased estate, cars or any other item you may want to leave to a specific person or charity.

Give some thought to who you want to benefit from your assets (the beneficiaries) and who you will appoint to administer your estate (the executor).

Making your Will

Your Will must be in writing. It must be signed by you in the presence of two witnesses (who are both present at the same time), and it must be dated at the time it is signed. You must be at least 18 years of age to make a Will (unless you are married or have obtained a court order).

At the time you make or change your Will, you must have the mental capacity to understand what you are doing. You must not suffer from any mental impairment that prevents this. You must be able to read the Will or have it read to you, and fully understand the document and its implications. You must also be acting of your own free will, and not be under pressure from anyone else. If not, the Will or any changes may be challenged and rejected by a court.

If you do not have capacity to make a Will, a person may apply for a court order for what's known as a 'statutory Will' to be made on your behalf. A court will only make an order for a statutory Will if satisfied that you do not have capacity to make a Will yourself. The court must also be satisfied the statutory Will reflects what your intentions would be likely, or might reasonably be expected, to be.

You can get a 'Do it yourself' Will kit, for example from the Post Office. However, you may wish to ask an expert to help you, especially if your Will is likely to be complex. They can raise potential problems with you.

State Trustees also offers a Will-making service. This costs between \$55 and \$300 for a standard Will depending whether or not State Trustees is the executor. This service is offered by a 'Will writer', and is available by appointment on 9667 6714.

★ To find a lawyer who specialises in this area, telephone the Law Institute of Victoria Referral Service on 9607 9550.

Beneficiaries

When you make a Will, you can say who is to get particular pieces of your property. You can also name charities and make bequests to certain organisations. You can make bequests for any purpose that you think is worthwhile.

You may also choose to leave your estate ‘in perpetuity’. This means that your estate remains as it is for good, with the person or organisation you name benefiting from the interest earned on the estate.

Appointing an executor

When making a Will, you will need to appoint an executor. This could be someone close to you whom you trust. Or it could be a professional person or organisation such as the State Trustees or a lawyer. If you appoint a professional, you will need to pay fees.

An executor is responsible for distributing your assets to the beneficiaries of your Will. An executor will also often attend to funeral arrangements, pay any outstanding debts or expenses, prepare tax returns and attend to business interests before distributing assets to the beneficiaries. An executor can also act as a trustee to administer assets on behalf of children until they come of age. If the estate is large or complex, the executor may be under a lot of pressure. Think about this when deciding whether to nominate a person or an organisation as your executor.

Changing your Will

You can change your Will by:

- making a new Will (which cancels your earlier Will)
- changing your existing Will
- revoking or cancelling your Will by tearing it up.

If you revoke your Will, you will need to make a new Will to replace it.

If you make changes (including minor changes) to your Will or you make a new Will, the changes or the new Will must be made in exactly the same way as the original Will:

- the changes or the new Will must be in writing, and signed by you in the presence of two witnesses
- you must have the necessary mental capacity and be acting of your own free will at the time.

Reviewing and updating your Will

Regularly review and update your Will. You may want to make changes, for example if your relationships change, a beneficiary or executor dies or something changes about your assets. You should make a new Will if you get married, separated or divorced.

Store your Will safely and make sure your family and executor know where it is.

Distribution of property after a person dies

Many couples own their assets jointly, especially real estate and bank accounts. If one partner dies, land owned jointly must then be registered in the surviving partner's name. To register jointly owned land in their name, the surviving partner will need to fill in an application form at Land Victoria, Level 9, 570 Bourke Street, Melbourne, telephone 8636 2070. This is a simple process. You usually don't need to get a formal court order in relation to the assets (called a grant of probate).

If assets are owned solely by the partner who dies, the executor must apply to the court for a grant of probate. You will need to see a lawyer about this.

Power of attorney and power of guardianship

At some time you may want to appoint a ‘power of attorney’. This is a legal document that allows someone you trust to act and make decisions on your behalf, for example, if you are absent or unable to make your own decisions and manage your own affairs.

There are four kinds of powers of attorney: a general power of attorney, an enduring medical power of attorney, an enduring financial power of attorney and an enduring power of guardianship.

A general power of attorney gives someone the power to act on your behalf in certain circumstances that you can specify, for example, the power to act on your behalf and run your affairs when you are in hospital. However, a general power of attorney applies only when you are well enough to be physically and mentally capable of making your own decisions. It ceases if you become too unwell to do this.

An enduring power of attorney does not cease if you become unwell and are no longer able to make informed decisions for yourself. This might be the case when some cancer medications (for example, pain relievers) affect your mental ability. Before this happens, you can delegate your decision-making power to someone else by granting that person an enduring power of attorney. However, you can only grant an enduring power of attorney when you are still well enough to be able to understand its effect and what it means.

Enduring medical power of attorney

When you give someone an enduring medical power of attorney, they are able to make decisions on your behalf about medical treatment you may need, and consent as your legal representative to that treatment. That person (your attorney) cannot make all decisions regarding your treatment, however. They can only refuse medical treatment if the

treatment would cause you unreasonable distress, or if they reasonably believe that you would have considered the treatment unnecessary. Therefore, it is important that your attorney knows your wishes for any future medical treatment.

Your attorney also cannot agree on your behalf to medical procedures that would be likely to lead to infertility, termination of a pregnancy or removal of tissue for transplant. (For any of these procedures, your attorney would need to apply to the Guardianship List of the Victorian Civil and Administrative Tribunal for a decision.) Your attorney cannot arrange euthanasia or refuse palliative care (treatment to ease symptoms when curative treatment is no longer possible).

Enduring financial power of attorney

An enduring financial power of attorney gives the person you appoint the power to make financial and legal decisions for you. The power can be specific, meaning that your attorney can only act in relation to matters specified by you, or all-embracing, meaning that your attorney can act in all financial and legal matters for you. You can state in the enduring power of attorney either a date or certain situation when the enduring power of attorney will start to operate. For example, the power of attorney might begin if you became unable to manage your affairs because of ill-health or impairment.

Enduring power of guardianship

An enduring power of guardianship is a legal document that allows you to appoint another person you trust to make certain decisions for you if you become unable to make these decisions. These decisions would be about day-to-day matters such as your health care and where you live. You can:

- give your guardian unrestricted powers to make these decisions
- specify the types of matters you want your guardian to have the power to make decisions about

- specify any wishes you want the guardian to take into account.

An enduring power of guardianship cannot be used to make financial or legal decisions on your behalf.

If you give your guardian the power to make decisions about your health care, they can agree to medical treatment on your behalf. They cannot refuse medical treatment. However, if you have also appointed another person as an enduring medical power of attorney, they will take precedence over your guardian in any medical treatment decisions. In this case, your guardian will not be able to make these decisions on your behalf.

Who can appoint or act as an attorney or guardian?

Anyone with sufficient mental capacity who is at least 18 years of age can appoint a power of attorney or enduring power of guardianship. Anyone with sufficient capacity who is at least 18 years of age can act as an attorney or guardian. This means that at the time of appointing or acting as an attorney or guardian, you must be able to read the power of attorney or guardianship document or have it read to you. You must also be able to fully understand the document and its effects and implications. You must not have any mental impairment that prevents you from understanding this, or be acting under pressure from anyone else.

You should ensure that your attorney or guardian is someone you trust to manage your affairs and look after your interests, and that they are happy to take on the role.

You may choose to appoint more than one attorney or guardian. You can specify that the attorneys can make decisions for you:

- jointly (together)
- severally (independently of each other)
- jointly or severally

- alternatively (the ‘alternative’ attorney or guardian can only make decisions if the first one is unable to).

How can I appoint an attorney or guardian?

Forms for appointing a power of attorney or enduring power of guardianship are easy to complete. You can get them from your lawyer, law stationers or most newsagencies, or from the Office of the Public Advocate (see details below).

The power of attorney must be signed by you (the donor) and two witnesses. You must all sign the document in the presence of each other. One of the witnesses must not be related to you or the person you are appointing as your attorney.

One of the witnesses must be a person who is authorised to witness the signing of a statutory declaration, for example, a practising Australian lawyer, a member of the police force, a registered doctor or dentist, a pharmacist or a bank manager.

★ For more information on persons authorised to witness signings of statutory declarations, contact the Supreme Court of Victoria Honorary Justices Office on 9603 9090.

The witnesses must sign documents stating that you signed the power of attorney freely and voluntarily in their presence, and that you understood its effect. The attorney (i.e. the person to whom you are granting the power of attorney) must also sign and date a statement of acceptance.

You can get the relevant form at www.publicadvocate.vic.gov.au or by contacting the Office of the Public Advocate’s Advice Service on 1300 309 337. You can also contact your local community legal centre. See the listing at the back of the booklet.

*** The information in this chapter is brief, and may not be relevant to every situation. Powers of attorney are sometimes complex. You may need specialist advice.**

Effects on employment

Many employers will be very supportive when an employee is diagnosed with cancer. However, if you feel you are treated unfairly or harshly by your employer, there are ways you can appeal.

A number of situations could make you feel victimised. Below are some examples. You should get advice about your own situation.

Termination of employment

If you are dismissed or 'sacked', it may be a case of unfair dismissal, unlawful termination or both. Unfair dismissal and unlawful termination have different legal meanings. Unfair dismissal is when your dismissal is considered harsh, unjust or unreasonable. Unlawful termination is when your employment is terminated for an unlawful reason that is set out in legislation.

There is more scope for appealing against an unfair dismissal than an unlawful termination.

Unfair dismissal

Where a termination of employment is considered harsh, unjust or unreasonable, legal proceedings can be brought for unfair dismissal under the *Workplace Relations Act 1996* (Cwlth). The Australian Industrial Relations Commission will consider, among other things:

- whether there was a valid reason for the termination that related to the capacity or conduct of the employee or to the operational requirements of the employer's business
- whether the employee was notified of that reason
- whether the employee was given an opportunity to respond to that reason.

An application must be lodged within 21 days after the day on which the termination of employment happened. Employees who work

for employers with fewer than 101 employees cannot make an unfair dismissal application. There are a number of steps and timelines to comply with after lodging an application for unfair dismissal. It would be wise to seek legal help.

Unlawful termination of employment

In some cases, the termination of employment will be illegal. Two illegal reasons that may be relevant are:

Temporary absence from work because of illness or injury

This will only be considered unlawful if you presented a medical certificate to your employer within 24 hours of being absent, you met all award and employment agreement terms, and your total absences from work were less than three months in any 12-month period.

Unfortunately, this means that if your cancer requires you to be off work for more than three months in a 12-month period and you are not on paid sick leave, then you can be lawfully dismissed.

Physical or mental disability

If your employment is terminated because you have a physical or mental disability, including cancer or a disability caused by cancer, it may be illegal.

What should I do?

If you think you have been unfairly dismissed or your employment illegally terminated, talk to a lawyer. For free initial advice and referral to a lawyer with expertise in this area, contact Jobwatch. Jobwatch is a Community Legal Centre that specialises in employment issues. Details can be found in the listing at the back of this booklet.

Discrimination and harassment

If you are discriminated against, the law that applies is the *Equal Opportunity Act 1995* (Vic) or the *Disability Discrimination Act 1992* (Cwlth).

Not all forms of discrimination are covered by these laws. For it to be illegal, the discrimination must be on one of the grounds covered by the Acts. If you are discriminated against because you have cancer, the relevant ground is 'impairment' or 'disability'. The discrimination must happen in one of the areas specified by the Act, one of which is 'employment'.

If a person in the course of employment takes part in discriminatory behaviour, both that person and their employer may be liable (legally responsible). Illegal discrimination may happen directly when a person with a disability is treated less favourably than a person without that disability in the same or similar circumstances. Unlawful discrimination may also happen indirectly, for example if a person with a disability is required to comply with a condition that they cannot comply with because of a disability, and which is unreasonable in the circumstances.

The law states that an employer must not discriminate against a person applying for a job on the grounds of his or her disability or impairment in:

- deciding who should be offered employment
- the terms on which employment is offered
- refusing, or deliberately not offering, employment.

An employer must not discriminate against an employee on the grounds of his or her disability or impairment in any of the following:

- the terms or conditions of employment
- denying or limiting access to opportunities for promotion, transfer or training or to any other benefits connected with the employment

- dismissing the employee or otherwise ending employment
- denying the employee access to occupational training or retraining programs
- imposing a requirement or condition that cannot be complied with because of a diagnosis of cancer
- subjecting the employee to any other loss or damage.

The legislation also protects the rights of contract workers and people applying to employment agencies for work.

If you believe you have been illegally discriminated against because of a diagnosis of cancer, seek legal advice immediately.

You can obtain free initial advice from the Disability Discrimination Legal Service. This service specialises in disability discrimination law. See the Community Legal Centres listing at the back of this booklet.

You can also contact:

Victorian Equal Opportunity and Human Rights Commission

Level 3, 380 Lonsdale Street, Melbourne 3000
Telephone 9281 7111 or 1800 134 142 (toll free)
www.humanrightscommission.vic.gov.au

Human Rights and Equal Opportunity Commission (Commonwealth)

Level 8, Piccadilly Tower, 133 Castlereagh Street, Sydney 2000
Telephone: (02) 9284 9600 or 1300 369 711
www.hreoc.gov.au

*** The information in this chapter is brief, and may not be relevant to every claim. Employment law is a complex area of law. You will need specialist advice.**

Occupational cancers

If your work has caused or contributed to your cancer, you may be able to claim for financial compensation. Examples include cancer that has been caused or contributed to by exposure to substances such as asbestos, coal tar pitch, wood dust, rubber, benzene, radiation or ultraviolet light.

Compensation claims for occupational cancer

Claiming compensation for occupational cancer is a complex area of the law. The lawyer will often need to do extensive research and intensive work.

A law firm with expertise in this area should be considerate of the shock and distress you are likely to feel as a result of finding out you have cancer. They should make every attempt not to intrude on your life and to minimise any stress or inconvenience. However, if you wish to claim compensation, there will be a need for some input from you. Below is an overview of the process and answers to some commonly asked questions.

Occupation and increased cancer risk

Various substances that an employee may be exposed to in the workplace are known to increase the risk of cancer. However, the research in this area is complex. A person's lifestyle factors that may have contributed to the cancer, such as smoking and alcohol, will need to be considered. So too will their exposure to a carcinogen (cancer-causing substance) in the workplace, and the research in the area. Sometimes, for example, smoking may be the only recognised cause of the specific type of cancer, and no claim would then be possible against your employer. However, sometimes smoking and occupational

exposure to a cancer-causing substance may have combined to increase the risks of developing cancer. A claim against your employer may then be possible.

What's involved in finding out if you can claim?

Consult a lawyer

Some law firms let you have the first consultation take place in their office, at your home or in hospital. It will usually take about one hour. Many occupational cancers are linked with long periods of exposure to the cancer-causing chemicals, so the first meeting will include lots of questions about your work history.

The lawyer will also ask about the types of substances to which you were exposed.

★ To find a lawyer who specialises in this area, telephone the Law Institute of Victoria Referral Service on 9607 9550.

Investigation

Usually, an expert opinion is needed about the most likely cause of the cancer and whether your work caused or contributed to it. An opinion may be sought from either your own doctor or a specialist familiar to your lawyer. Sometimes an expert opinion is also needed from an industrial hygienist about acceptable workplace standards at the time of your exposure.

What has to be proved?

Two types of compensation claim are relevant: a worker's compensation claim and a common law claim.

Worker's compensation claim

In each Australian state and territory there is a legal scheme for compensation for workers with injuries or diseases they sustain at work. The schemes limit the amount of compensation available and have strict timeframes for making claims.

To be eligible, you need to show that the work, and particularly the exposure to the cancer-causing chemical, made a significant contribution towards causing and/or speeding up the growth of the cancer.

Common law claim

Many chemicals are known to cause cancer. Companies that use known cancer-causing chemicals have to make sure workers are not exposed to the chemicals' harmful effects.

If a person is exposed to a known cancer-causing chemical and gets cancer because the company did not do enough to protect them, they may be able to make a common law claim against the company.

A common law claim is a compensation claim for past and future earnings a person has lost, and pain, suffering and loss of enjoyment of life as a result of getting cancer. You would have to show that your employer carelessly failed to provide a safe working environment, and to provide you with enough protection from exposure to dangerous chemicals that caused or contributed to you developing cancer.

What's involved in making a claim?

The steps are:

- 1 Consulting with a lawyer as described above.
- 2 Giving written consent for people to access your medical records and reports.
- 3 Providing copies of documents that may be relevant.
- 4 It is most likely that your lawyer will organise visits to independent doctors to get their expert opinion about the causes of your

cancer. Appointments can be arranged at home or in hospital if necessary. The doctors will discuss with you the substances you were exposed to, and will review any tests. You will not need to have any further tests.

- 5 Answering written questions with the help of your lawyer.
- 6 Giving instructions by telephone during any negotiations.

You may have to give evidence at a hearing, but most cases settle (i.e. reach agreement for compensation) without a trial.

How long will my claim take?

The average time for claims relating to cancer is between three and six months from the time you first see your lawyer until the case is resolved. Claims can proceed faster where medical evidence shows that you are very unwell, and therefore the claim requires urgent attention.

What happens if a person dies before their claim is resolved?

In most states and territories, cancer caused by exposure to various dusts such as asbestos is subject to special legislation. If you start the claim during your lifetime, the claim can proceed if you die before it is resolved. It is vital that you consult a lawyer for advice as soon as possible after your diagnosis.

How much would the compensation be?

The amount depends on the issues and evidence in each case. However, where there is good evidence to support a claim, substantial compensation could be payable.

What will my claim cost?

Some larger law firms with expertise in this area will not charge for the first consultation. Usually they will also agree to investigate a claim for you and will not charge a fee if the matter does not go ahead.

You may have to pay for expert opinion from medical specialists about the cause of your cancer. However, if the matter went ahead and was successful, the party you won the claim against would have to cover the cost of the expert opinion.

Once you have obtained an expert opinion that supports a link between your employment and your cancer, some law firms will represent you on the basis that they will only charge a fee if the action is successful: ‘no win – no charge’.

Upon settlement of your claim, you will be asked to contribute towards the legal costs from the compensation you are paid. Each firm has its own fee arrangements. Generally legal fees are calculated by the number of hours worked according to a scale set by a court.

Time limits

In Victoria, the law requires you to claim within three years of finding out you have cancer. At the end of the three-year period, you will not be able to bring proceedings – but there are exceptions. Consult a lawyer even if you think the three years have passed. The period for making a claim in the other Australian states and territories varies.

Examples of legal cases

Example A: Mesothelioma

In 1960, mesothelioma was defined as a cancer for which the only proven cause is exposure to asbestos. In a claim in relation to mesothelioma, the only issues are where the asbestos exposure occurred and what the

employer or occupier of the premises did to protect against dangers of asbestos at the time of the exposure.

Some people diagnosed with mesothelioma don't know where they have been exposed to asbestos. Specialist lawyers are often able to identify where and how a person was exposed. Provided an asbestos exposure can be established, a claim for compensation should be successful.

Example B: Asbestos exposure, smoking and lung cancer

The level and extent of both a person's asbestos exposure and smoking history will be considered when assessing the strength (and value) of the claim.

Specialist doctors usually provide opinions as to how much cancer risk is due to asbestos exposure and how much risk is due to smoking. Frequently, the contribution to the cancer risk caused by smoking is taken into account; this is called 'contributory negligence'.

Example C: Wood dust and nasal cancer

People who have been heavily exposed to wood dust are at increased risk of nasal cancers. The link between excessive wood dust exposure and nose cancer was first recognised in about 1965.

Example D: Bladder cancer

A link between occupational factors (such as exposure to fumes from hot rubber) and increased risk of bladder cancer has been known about since the 1950s.

*** The information in this chapter is brief, and may not be relevant to every claim. Litigation is complex and specialist advice is essential.**

Medical negligence

Claims can be made against health care providers such as public and private hospitals, general practitioners, specialists such as surgeons or gynaecologists, nurses, physiotherapists, chiropractors, naturopaths and pharmacists, if they have been negligent. There are also other types of complaints procedures.

What is medical negligence?

Where a doctor or hospital fails to provide advice or treatment with reasonable skill and care, their actions may be negligent (careless). To make a claim, you must show that you suffered an injury or a worsening of a pre-existing condition because of this negligent treatment. To obtain compensation, you must also show that the injury is permanent and of a certain degree of severity.

You can make a medical negligence claim where there has been:

- a failure to diagnose or treat promptly
- negligent treatment including failure to follow up after treatment
- a failure to advise you of risks of procedures or treatment.

What's NOT medical negligence?

There must be negligence in order to claim against a doctor or hospital. Many treatments have risks and people often choose to have a treatment despite the risk. You cannot make a claim just because a known risk becomes a reality. Medical negligence is when you can prove a lack of reasonable skill and care on the part of the doctor.

Negligent treatment but no injury?

You have to prove that the negligence caused you to suffer injury or harm, or contributed to this. Generally, if you have been treated

negligently but no injury or harm was caused to you, then you are not entitled to compensation. However, there are other complaints procedures you can pursue. See the Alternatives to litigation: complaints procedures on page 34.

Types of medical negligence

Delay in diagnosis

To make a claim for a delay in diagnosis of a condition, you must show that the delay made your condition substantially worse and therefore caused you damage. Often it would depend on the type of cancer you have.

Example A

A doctor sends a patient for chest x-rays, and mistakenly advises the patient that the x-ray is clear. In fact, the x-ray identifies a tumour which indicates advanced lung cancer. Six weeks later, the doctor realises that the wrong x-rays were reviewed. The doctor then makes the correct diagnosis. The effect of the delay in the correct diagnosis in this case probably makes no difference to the patient's outcome, as the course of the cancer would have been the same whether or not it had been found six weeks earlier.

Example B

A patient consults her local doctor, concerned about a small raised mole on her shoulder that she thinks may have recently grown. The doctor examines the mole briefly and reassures the patient that, while it could be cut out, it is most probably harmless and not to worry. The patient is not completely satisfied with this advice, and visits another doctor six months later. This time the doctor recommends having the mole removed, and pathology reveals that it is a melanoma. Because

early diagnosis of melanoma greatly increases the chance of successful long-term treatment, the delay in diagnosis has caused an injury.

Negligent treatment or follow-up

Complaints about treatment or follow-up cover a range of problems. For example, a surgeon might leave a drainage tube in the patient's abdomen which leads to infection and other complications. Damage might be caused to body organs during keyhole surgery. Sometimes the main complaint is that the doctor failed to promptly diagnose the complication.

Failure to advise you of risks

Your doctor must advise you of all 'material' risks associated with treatment or a procedure. This means whether a reasonable person in your situation would attach significance to the risk (i.e. whether a reasonable person would think the risk was significant enough that they would consider not going through with the treatment or procedure). If a reasonable person would attach significance to it, then the risk is material and your doctor must advise you of it.

Example A

A woman has a biopsy to remove cancerous and pre-cancerous cells of the cervix (part of the womb). She has a general anaesthetic, which means she is unconscious for the operation. There is a 1 in 1000 chance of someone having a complication due to the anaesthetic, and she is not warned of this chance before the operation. Unfortunately, the woman suffers a stroke due to the anaesthetic. It may be difficult to make a legal case that she would not have had the surgery even if she had been warned of the 1 in 1000 risk.

Claiming medical negligence

Lawyers begin by:

- 1 requesting hospital records or medical reports
- 2 researching the medical issues
- 3 getting the opinion of an independent medical expert in the relevant field about whether the treatment was below an acceptable standard of care.

Once supporting medical evidence has been gathered, a letter of demand may be written or court proceedings issued.

Time limits

There are time limits for bringing a claim.

Adults have **three years** and children have **six years** to start legal proceedings. These time periods begin from the date the injury or possible negligence was 'discoverable'. This can be tricky to work out. If you are concerned about medical treatment you have received, obtain legal advice promptly.

Compensation

The amount awarded for medical negligence is usually made up of compensation for:

- pain and suffering and loss of enjoyment of life if you can show that your injury is permanent and of a certain degree of severity
- out-of-pocket expenses for health care, medication and other aids, for past expenses and expected future expenses
- loss of income, past and future
- the cost of care provided to you either by paid assistance or by family members or friends in some circumstances.

Alternatives to litigation: complaints procedures

Often concerns about health care are a result of poor communication between the doctor and the patient. If you have concerns, you should speak with your doctor or, if available, hospital staff counselling or advocacy services. You should continue to ask questions until you have enough information to understand the treatment and/or how it may impact on you.

The Health Services Commissioner tries to resolve complaints and claims made by individuals against health care providers. Health care providers are doctors, hospitals, dentists, nurses, physiotherapists, pharmacists, chiropractors and others. Usually the Health Services Commissioner investigates claims within one year from the date of the complained-about treatment.

- The commissioner passes on your formal complaint to the health care provider and seeks a written response.
- If this does not resolve the complaint, the commissioner will investigate.
- Following the health care provider's response to the complaint or the investigation, the parties may attend a conciliation with staff from the Health Services Commissioner. Conciliations are confidential. They may result in further discussion, explanations or in a compensation payment to the patient.

Organisations such as the Medical Practitioners' Board of Victoria or the Nurses Board of Victoria regulate health care providers and hear complaints against individual providers.

Hospitals usually have an officer who deals with complaints, including claims for compensation. These officers can be particularly helpful in sorting out communication problems between health care providers and patients and their families.

In the case of negligent treatment causing death, the matter may be referred to the Coroner's Court for investigation.

Contact the Health Services Commissioner on 8601 5200 or toll free on 1800 136 066.

Access to medical records

Legislation in Victoria gives patients rights to access their medical records.

If you were treated as a public patient, you can request a copy of your medical records under the *Freedom of Information Act 1982* (Cwlth). The *Freedom of Information Act* sets out time limits for providing copies of medical records, fees for providing medical records and general rights to seek an amendment to the records. There is usually an application fee, and then a small fee per page for photocopying. Most large public hospitals will have a freedom of information officer to help with enquiries.

If you were treated as a private patient, you can access your health information under the *Health Records Act 2001* (Vic). This Act gives private patients a right to obtain a summary of the records and, in some cases, a right to obtain a copy of them. The Act states that a response to a request for access to records must be provided within 45 days. Fees can be charged for providing access to and photocopying your records.

For further information, visit www.health.vic.gov.au/hsc/ or contact the Health Services Commissioner on 8601 5200 or toll free on 1800 136 066.

*** The information in this chapter is brief, and may not be relevant to every claim. Medical negligence is a complex area of law for which specialist advice is essential. If you think you have a claim, you should speak to a lawyer.**

Guardianship of children

After being diagnosed with cancer, you may have concerns about your children and who will look after them if you die.

In your Will, you can say who you want to care and provide for your children. However, in the event that someone applies to the Family Court for guardianship of your children, the court will decide on the basis of what it considers best for the child. The Family Court will consider your wishes, but will ultimately decide on the basis of what is in the 'best interests of the child'.

Euthanasia

Euthanasia is deliberately bringing about the death of someone suffering from an incurable and painful disease or condition. In 1997, the Northern Territory passed the first law in the world allowing for euthanasia to be performed under specific circumstances and provided certain criteria were met. That Act, known as the *Rights of the Terminally Ill Act*, was repealed (cancelled) shortly afterwards.

There is now no law in Australia that allows euthanasia. The act of euthanasia remains illegal and subject to penalties under the Criminal Code.

Law was recently passed in The Netherlands allowing euthanasia in certain circumstances.

*** For further information, you can contact Dying with Dignity Victoria through their website www.dwdv.org.au or telephone 9877 7677.**

Cancer sites and occupational exposures

Table 1:
Cancer sites for which relationships with occupational exposures are well established in human studies

Site	Agent or Industrial Process
Bladder	Benzidine, 2-naphthylamine; 4-Aminobiphenyl (xenylamine) Coal tar pitch volatiles (aluminum reduction plants, chimney sweeps) Manufacture of certain dyes (eg. auramine and magenta) Gas retorts Rubber and cable-making industries
Blood (leukemia)	Benzene X-radiation
Bone	Radium, mesothorium
Larynx	Mustard gas Sulfuric acid mist
Liver (angiosarcoma)	Arsenic (inorganic compounds) Vinyl chloride

Site	Agent or Industrial Process
Lung, bronchus	Arsenic (inorganic compounds) Asbestos Beryllium and beryllium compounds Bis(chloromethyl) ether, chloromethyl methyl ether Cadmium and cadmium compounds Chromim compounds Coal carbonisation process (coke ovens, gas retorts, producer gas) Coal tar pitch volatiles (roofing materials, aluminium reduction plants, chimney sweeps) Foundry workers Iron ore (hematite) mining Mustard gas Nickel and nickel compounds Painters Radiation (radioactive ores or radon) Sulfuric acid mist
Nasal cavity, sinuses	Isopropanol manufacture by strong acid process Mustard gas Nickel and nickel compounds Radium, mesothorium Shoe manufacturing (leather dust?) Woodworking (wood dust?)
Peritoneum (mesothelioma)	Asbestos

Site	Agent or Industrial Process
Pharynx	Mustard gas
Pleura (mesothelioma)	Asbestos
Skin (including scrotum)	Arsenic (inorganic compounds) Coal hydrogenation Coal tar products (mainly coal tar, creosote pitch, soot) Mineral oils (from coal, petroleum, shale) Ultraviolet light X-radiation

Community Legal Centres

Federation of Community Legal Centres (Vic)

Suite 11, 1st floor, 54 Victoria Street,
Carlton South 3053
Telephone: 9652 1500
administration@fclc.org.au
www.communitylaw.org.au

Disability Discrimination Legal Service

c/o Ross House Association
2nd floor, 247 Flinders Lane,
Melbourne 3000
Telephone 9654 8644; toll free
1300 882 872; TTY 9654 6817
info@ddls.org.au
www.communitylaw.org.au/ddls

Jobwatch

5/21 Victoria Street, Melbourne 3000
Telephone 9662 1933 (advice); toll free:
1800 331 617
jobwatch@job-watch.org.au
www.job-watch.org.au

Albury Wodonga Community Legal Service

PO Box 31, Wodonga 3691
12 Stanley Street, Wodonga 3690
Telephone (02) 6056 8210
cls@umfc.com.au
www.communitylaw.org.au/alburywodonga

Barwon Community Legal Service

73 Pakington Street, Geelong West 3218
Telephone 5221 4744
info@geelegal.org.au
www.communitylaw.org.au/geelong

Brimbank Melton Community Legal Centre

Deer Park Office

822 Ballarat Road, Deer Park 3023
Telephone 9363 1811
info@communitywest.org.au
www.communitywest.org.au

Melton office

Suite 6, 3 Alexandra Street,
Melton 3337
Telephone 9971 1800
info@communitywest.org.au
www.communitywest.org.au

Broadmeadows Community Legal Service

180 Widford Street,
Broadmeadows 3047
Telephone 9302 3911
Broadmeadows_VIC@fcl.fl.asn.au
www.communitylaw.org.au/broadmeadows

**Casey Cardinia Community
Legal Service**

42 Claredale Road, Dandenong 3175

Telephone 9793 1993

caseyclc@vicnet.net.au

www.communitylaw.org.au/caseycardinia

**Central Highlands Community
Legal Centre**

PO Box 1982, Bakery Hill 3354

34 Victoria Street, Ballarat, 3350

Telephone 5331 5999

chclc@netconnect.com.au

www.chclc.org.au

Darebin Community Legal Centre

265 High Street, Preston 3072

Telephone 9484 7753

Darebin_VIC@clc.net.au

www.communitylaw.org.au/darebin

Eastern Community Legal Centre

Inner East

Suite 3, Town Hall Hub, 27 Bank Street,
Box Hill 3128

Telephone 9285 4822

eclc@eclc.org.au

www.eclc.org.au

Outer East

PO Box 747, Boronia, 3155

Suite B, 6 Floriston Road, Boronia 3155

Telephone 9762 6235

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outereas@eclc.org.au

Essendon Community Legal Centre

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Telephone 9376 7929

essclc@essclc.org.au

www.communitylaw.org.au/essendon

Fitzroy Legal Service

PO Box 297, Fitzroy 3065

124 Johnston Street, Fitzroy 3065

Telephone 9419 3744

enquiries@fitzroy-legal.org.au

www.fitzroy-legal.org.au

**Flemington & Kensington
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PO Box 487, Flemington 3031

22 Bellair Street, Kensington 3031

Telephone 9376 4355

fklegal@fkclc.org.au

www.communitylaw.org.au/flemingtonkensington

Footscray Community Legal Centre

220 Nicholson Street, Footscray 3011

Telephone 9689 8444

footlegal@iinet.net.au

www.communitylaw.org.au/footscray

Gippsland Community Legal Service

PO Box 103, Morwell 3840

162 Commercial Road, Morwell, 3840

Telephone 5133 0411;

toll free 1800 004 402

Gippsland_Vic@clc.net.au

www.communitylaw.org.au/gippsland

Loddon Campaspe Community Legal Centre

PO Box 432, Bendigo 3552
29 Queen Street, Bendigo 3552
Telephone 5444 4364;
toll free 1800 639 121
admin@advocacyandrights.org.au
www.communitylaw.org.au/loddoncampaspe

Monash Oakleigh Legal Service

60 Beddoe Avenue, Clayton North 3168
Telephone 9905 4336
www.communitylaw.org.au/monashoakleigh

Moreland Community Legal Centre

17 Sydney Road, Coburg 3058
Telephone 9383 2588
info@morelandclc.org.au
www.communitylaw.org.au/coburgbrunswick

Murray Mallee Community Legal Service

PO Box 1870, Mildura 3502
122 Ninth Street, Mildura 3502
Telephone 5023 5966;
toll free 1800 243 002
mmcls@malleefamilycare.com.au or
tjayet@malleefamilycare.com.au
www.communitylaw.org.au/murraymallee

North Melbourne Legal Service

1st Floor, 504 Victoria Street,
North Melbourne 3051
Telephone 9328 1885
North_Melbourne@clc.net.au
www.communitylaw.org.au/northmelbourne

Peninsula Community Legal Centre

Chatsworth House, Suite 1–4, 431 Nepean
Highway, Frankston 3199
Telephone 9783 3600;
toll free 1800 064 784 (0359 area only)
pclc@pclc.org.au
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Bentleigh branch

82 Brady Road, Bentleigh East 3165
Telephone 9570 8455

Cranbourne branch

Suite 12, 33–39 High Street, Cranbourne
3977
Telephone 5995 3722

Pines branch

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Southport Community Legal Service

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South Melbourne 3205
Telephone 9646 6066
scls@vicnet.net.au
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South West Community Legal Centre

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50 Fairy Street, Warrnambool 3280
Telephone 1300 361 680
wjones@comconnect.com.au
www.comconnect.com.au

Springvale Monash Legal Service

PO Box 312, Springvale 3171
5 Osborne Avenue, Springvale 3171
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info@smls.com.au
www.smls.com.au

Wyndham Legal Service

Suite 10, 2–14 Station Place,
Werribee 3030
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Wyndham_Vic@clc.net.au
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161 Chapel Street, St Kilda 3182
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Surfcoast Community Legal Service

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surfcoastcommunitylegalservice@hotmail.com
www.surfcoastcommunityls.wordpress.com

West Heidelberg Community Legal Service

21 Alamein Road, West Heidelberg 3081
Telephone 9450 2002
www.communitylaw.org.au/westheidelberg

Western Suburbs Legal Service

30 Hall Street, Newport 3015
Telephone 9391 2244
wsls@vicnet.net.au
www.communitylaw.org.au/westernsuburbs

Whittlesea Community Legal Service

Community Information Whittlesea
Shop 111 Epping Plaza, Epping 3076
Telephone 9401 6655
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www.vicnet.net.au/~ciwwhit

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Cancer information in other languages

خط معلومات السرطان باللغة العربية

إتصلوا بالخط
للتحدث الى ممرضة عن مرض السرطان
باللغة العربية على لرقم **9209 0160**

Polskojęzyczna Infolinia na Temat Raka

Aby móc porozmawiać z pielęgniarką na temat raka w języku polskim należy dzwonić pod numer **9209 0165**

廣東話癌症信息專線

用廣東話與護士談論癌症
請致電 **9209 0161**

Информационная линия по раковым заболеваниям на русском языкеЕсли вы хотите поговорить по-русски с медсестрой о раковых заболеваниях, то позвоните по номеру **9209 0166**

Ελληνική Γραμμή Πληροφοριών για τον Καρκίνο

Για να μιλήσετε σε μια νοσοκόμα σχετικά με τον καρκίνο στα Ελληνικά, τηλεφωνήστε στο **9209 0162**

Línea telefónica de Información sobre el Cáncer en el Idioma Español

Para hablar con un(una) enfermero(a) en español llame al **9209 0167**

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Per parlare del cancro con un infermiere in italiano chiama il **9209 0163**

Đường dây Chỉ dẫn về bệnh Ung thư bằng tiếng Việt

Nói chuyện với y tá về bệnh ung thư bằng tiếng Việt, gọi số **9209 0168**

普通话癌症信息专线

若要用普通话与护士讨论癌症
请电 **9209 0164**

For other languages please call 9209 0169. Tell us which language you speak and an interpreter will help you talk to a nurse. To speak to a nurse in English, call 13 11 20.

INTERNET: For information in a range of languages please visit our multilingual website at: www.cancervic.org.au/other_languages



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